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MEMORANDUM

CONFIDENTIAL

To: American Hotel & Lodging Members
From: Minh N. Vu
Date: June 30, 2008
Re: ADA Title III Notice of Proposed Rulemaking

We have conducted a preliminary review of the Department of Justice's (the "Department") Notice of Proposed Rulemaking (NPRM) for Title III of the ADA for issues that are most likely to impact the hospitality industry and they are summarized below. Given the complexity and length of the NPRM and related documents, other issues will likely become apparent as we continue our analysis of the NPRM. The purpose of this document is to give AH&LA's members an overview of the NPRM so that they can provide feedback to AH&LA on their topics of interest. Feedback from the industry on many issues is critical to the development of meaningful comments to the NPRM. Members should provide their comments/questions/data to us by July 17, 2008. Comments must be sent to the Department by August 17, 2008.

The following terms will be used in this document:

"NPRM" – Notice of Proposed Rulemaking

"RIA" – Regulatory Impact Assessment issued by the Department with the NPRM

"App. A" – Appendix A to the NPRM which contains a discussion of the various changes to 1991 ADAAG.

"1991 Standards" – ADA Accessibility Standards issued in 1991 that are currently in effect, also commonly referred to as ADAAG.

"2004 ADAAG" – The specific requirements and technical specifications for elements in public accommodations issued by the Access Board in 2004 which DOJ proposes to adopt in full.

Existing Facility – A public accommodation facility in existence at the time that the new regulation takes effect.

New Hotel – A hotel constructed after the new regulation takes effect.

Altered Hotel – A hotel altered after the new regulation takes effect.

The Department – the Department of Justice

POTENTIAL ISSUES FOR COMMENT

1. Trigger date for application of 2004 ADAAG. Proposed Sec. 36.406(a)(1) specifies that new construction and alterations shall comply with the 1991 Standards if physical construction of the property commences less than six months after the effective date of the proposed rule. Proposed section 36.406(a)(2) specifies that new construction and alterations shall comply with the 2004 ADAAG if physical construction of the property commences six months or more after the effective date.

The Department has posed the following question:

Question 50: The Department proposes using the start of construction as the triggering event for applying the proposed standards to new construction under title III. The Department asks for public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. Is the proposed definition of the start of construction sufficiently clear and inclusive of different types of facilities? Please be specific about the situations that are not covered in the proposed definitions, and suggest alternatives or additional language. In addition, the Department asks that the public identify facilities subject to title III for which commencement of construction would be ambiguous or problematic.

2. Definition of what is a “barrier” in an Existing Facility – the NPRM states that any element in an Existing Facility that does not fall within a safe harbor or does not comply with the 2004 ADAAG for new construction and alterations is a “barrier” that must be removed, unless the removal is not “readily achievable.” (Proposed Section 36.304(d)(3) states: “For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in Sec. 36.402 and Sec. Sec. 36.404 through 36.406 of this part for the element being altered. . . .”)
3. The Department’s recent interpretation of what is “readily achievable.” As many in the industry know, the Department has generally ignored the statutory definition of “readily achievable” (i.e. “easily accomplishable and able to be carried out without much difficulty or expense”) and has instead inappropriately taken the position in many of its enforcement actions that if a company has significant resources, barrier removal equals compliance with the alterations and new construction standard.
4. Element by Element Safe Harbor. This safe harbor only applies to elements that are covered by the 1991 Standards for which the 2004 ADAAG has greater or different

accessibility requirements. Elements in existing facilities that are not altered after the effective date of the rule and that comply with the 1991 Standards are not required to be modified in order to comply with the proposed standards. The elements that fall under this safe harbor are identified as items 1-66 of Appendix 8 of the Regulatory Impact Analysis (RIA). The problem is that there are several key incremental changes to the 1991 Standards that the Department has not recognized as changes, and as a result do not fall under the Element by Element Safe Harbor. They include: (1) accessible room dispersion in pre-1993 hotels; and (2) the sales and service counter depth requirement.

5. Path of Travel Safe Harbor. Proposed Sec. 36.403(a)(1) states that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel.
6. Small Business Safe Harbor. The Department is proposing a safe harbor which provides that a qualified small business (as defined by the federal government's standards) would have met its readily achievable barrier removal obligations for a given year if it has spent at least one percent (1%) of its *gross revenues* for the preceding year on barrier removal. For example, a non-casino hotel earning \$6.5M gross annual revenue in 2007 would be deemed to have fulfilled its obligation to engage in barrier removal if it has spent up to \$65,000 in barrier removal in 2008. Concerns to be addressed include: (1) the 1 %; (2) transfer of this concept to non-small businesses; (3) incompatibility with statutory definition of "readily achievable"; (4) suggestion that this is an amount that must be spent every year; (5) "spent" concept must include loss of selling space; and (6) the use of gross revenue, as opposed to net income, as a measure.

The Department of Justice has posed the following question on this subject:

Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?

7. Lack of safe harbor and transition/compliance period for newly covered elements in Existing Facilities. A number of elements covered by the 2004 ADAAG were not addressed under the 1991 Standards, and they are therefore not subject to any safe harbor. Thus, these newly covered elements will presumably be subject to the readily achievable barrier removal obligation on the effective date of the rule because the proposed regulation does not appear to provide any transition time for public accommodations to engage in barrier removal for newly covered elements. As discussed below, some of these elements include: (1) saunas & steam rooms; (2) swimming pools, (3) wading pools; (4) spas; (5) exercise equipment; (6) washer/dryers. These elements are discussed below.

8. Existing swimming pools (reduced scoping for barrier removal). Because swimming pools are not covered by the 1991 Standards, they are not protected by the Element by Element Safe Harbor. Thus, Existing Hotels that are not in compliance with the 2004 ADAAG on swimming pools on the Effective Date will have an obligation to bring their swimming pools into compliance when the regulations take effect.

The Department is proposing reduced scoping for Existing Facilities subject to the barrier removal obligation, as follows:

Existing swimming pools that have less than 300 linear feet of swimming pool wall would be exempt from requirement to provide an accessible entry. Existing swimming pools that have at least 300 linear feet of swimming pool wall will be required to provide only one (rather than two) accessible means of entry, which must be a sloped entry or a pool lift.

The Department has posed the following question:

Question 36: The Department would like to hear from public accommodations and individuals with disabilities about this exemption. Should the Department allow existing public accommodations to provide only one accessible means of access to swimming pools more than 300 linear feet long?

New and altered swimming pools. Section 242.2 of the 2004 ADAAG requires such pools, when newly constructed or altered, to provide two accessible means of entry (one means must be a sloped entry or lift). New or altered swimming pools with less than 300 linear feet of swimming pool wall would be required to provide one accessible means of entry.

9. Existing Play Areas (reduced scoping). Because play areas were not covered by the 1991 Standards, they are not subject to the Element by Element Safe Harbor. However, the Department is proposing reduced scoping for Existing Facilities subject to the barrier removal obligation, as follows:

Existing play areas of less than 1,000 square feet are exempt until they are altered. Larger existing play areas can substitute ground level accessible play components for the required number of accessible elevated play components (50%).

AH&LA seeks input from members as to whether this exemption will cover most play areas in lodging facilities.

The Department has posed the following questions:

Question 31: The Department requests public comment with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?

Question 33: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing play areas be permitted to substitute additional ground level play components for the elevated play components it would otherwise have been required to make accessible?

Question 34: The Department would welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines for play and recreational facilities undertaking alterations that would permit reduced scoping of requirements or substitution of ground level play components in lieu of elevated play components, as the Department is proposing with respect to barrier removal obligations for certain play or recreational facilities.

Question 35: Should the Department require only one play area of each type to comply in existing sites with multiple play areas? Are there other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping?

New and Altered Play Areas – The 2004 ADAAG play equipment rules are fairly complicated. Generally, there is no size exemption, at least one of each type of ground level equipment must be on an accessible route and be accessible, and at least 50 percent of elevated play areas must be on an accessible route and be accessible.

10. Saunas & Steam rooms. Because saunas and steam rooms were not covered by the 1991 Standards, they are not protected by the Element by Element Safe Harbor. However, the Department is proposing exempt saunas and steam rooms that fit 2 or fewer people. Existing saunas and steam room for more than 2 people will have to be retrofitted when the regulations take effect to have accessible turning space, an accessible bench, and the 32” clear doorway if the retrofit is “readily achievable” unless the retrofit is not “readily achievable.”

AH&LA is seeking data on the number of saunas/steam rooms for more than two people that are in existence and the cost of retrofitting such facilities.

11. Wading pools. Section 242.3 of the Proposed ADA Standards provides that newly constructed or altered wading pools must provide at least one sloped means of entry to the deepest part of the pool. The Department has expressed concern that installing a sloped entry in existing wading pools may not be feasible for a significant proportion of covered entities and is considering creating an exemption for existing wading pools that are not being altered. The Department is also interested in collecting information regarding the number of existing facilities that provide more than one wading pool on a site. As an alternative to an exemption for all existing wading pools, the Department is considering creating an exception that would permit existing facilities with multiple wading pools on a site to make only one of each type of pool accessible.

Question 39: What site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped

entry? What types of facilities provide more than one wading pool on a site? In such facilities, do the pools tend to be identical or do they differ in type (e.g., in size, configuration, function or use)?

Data from AH&LA members is necessary on this issue.

12. Spas. Sections 242.4 and 1009.2, 1009.4, and 1009.5 require spas to meet accessibility requirements, including an accessible means of entry (*i.e.* pool lift, a transfer wall, or a transfer system). Where spas are provided in clusters, five percent (5%) but at least one spa in each cluster will have to be accessible. Since this is a newly covered element, it will not be covered by the Element by Element Safe Harbor and would be a part of the barrier removal requirement.

AH&LA is seeking input from members on the difficulty of retrofitting existing spas.

13. Washing Machines and Dryers. One of each unit will have to be accessible. Since this is a newly covered element, it will not be covered by the Element by Element Safe Harbor and would be a part of the barrier removal requirement.
14. Operable Windows. If operable windows are provided, at least one operable window in an accessible space will have to have accessible operable parts (*i.e.* no higher than 48" AFF and be operable with one hand without twisting, tight grasping, or pinching and with less than 5 lbs of force). It is unclear whether this element falls under the Element by Element Safe Harbor.

Members should provide input about whether it would be possible to comply with this requirement for existing windows.

15. Exercise Equipment -- Sections 206.2.13 and 236 of the 2004 ADAAG require one of each type of fixed exercise machine to meet clear floor space specifications and to be on an accessible route. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

The Department has asked:

Question 40: Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?

AH&LA is seeking input on this question.

16. Employee work areas. The 2004 ADAAG requires that common use circulation paths (defined as "an exterior or interior way of passage provided for pedestrian travel" for use by two or more people and not for public use) in employee work areas be accessible with some exceptions, including employee work areas smaller than 1,000 s.f. as defined by permanently installed partitions, counters, casework or furnishings. The Department did not change the language of the 2004 ADAAG, but clarified in App. A that only

“primary” circulation paths need to be accessible, and that this requirement is already in current state and local fire regulations. While this clarification is a step in the right direction, it must be stated in an enforceable part of the regulation.

17. New limitation that only 10% of mobility accessible rooms can also be communications accessible rooms. Under the 1991 Standards, all mobility accessible rooms are also required to be communications accessible (i.e., have visible alarms, door bells, telephone notification). The 2004 ADAAG states that there can only be a 10% overlap between mobility and communications accessible rooms, raising the question of whether there is a safe harbor for Existing Hotels that have 100% overlap of mobility and communications accessible rooms. Will such hotels now only be allowed to count 10% of such rooms towards their required number of communications accessible rooms and be required to buy more communications kits? This is not listed as a changed requirement in the RIA, and may therefore not be viewed falling under the safe harbor.
18. Revised water closet clearance and new comparable vanity requirement (in guest rooms and other facilities). Under the 2004 ADAAG, the vanity/lavatory will no longer be allowed to overlap the required water closet clearance and accessible vanities must provide space comparable to non-accessible vanities. This requirement impacts accessible guest rooms as well as single user toilet rooms. Although vanities that comply with the 1991 Standards will fall within the Element by Element Safe Harbor (i.e. not subject to immediate barrier removal requirement), this requirement will impose significant additional costs in future alterations. Existing lodging facilities with bathrooms that comply with the 1991 Standards will have to move plumbing, bath fixtures, electrical outlets and fixtures, and possibly walls to comply with these new requirements when then they would have otherwise just changed out the fixtures but left their location intact.

AH&LA seeks member input on this important issue.

19. New dispersion requirement for accessible rooms across room classes in pre-1993 facilities. The Department refuses to recognize that the 1991 Standards do not require dispersion of accessible rooms across room classes in pre-1993 facilities that create accessible rooms through the alterations process. Accordingly, the Department does not consider this dispersion requirement for new and altered facilities, now made explicit in the NPRM, to be a change from current law. The failure to recognize the change means that accessible rooms that are not dispersed in pre-1993 Facilities will not fall within the Element by Element Safe Harbor.

In addition, relying on current regulations which do not identify view as a factor to consider in dispersing accessible rooms, hotels may have chosen to disperse based on the stated factors of "room size, cost, amenities provided, and the number of beds provided". Do those hotels now have to create new accessible rooms with views as part of a barrier removal requirement and/or in connection with an alteration?

AH&LA seeks member input on the impact of this change in future alterations.

DOJ seeks also comments on whether dispersion requirements should be applied proportionately, or whether it would be adequate to have at least one guest room of each type.

20. Lack of guidance about what constitutes appropriate dispersion. AH&LA had urged the Department to provide guidance on what appropriate dispersion should be. The Department provided no such guidance. Indeed, in informal discussions and its enforcement actions, the Department has informed AH&LA's counsel that one-of-a-kind rooms (e.g. Presidential suites) must be accessible.
21. New service counter requirements. Under the 1991 Standards, one of each type of sales and/or service counter must have a lowered section that is 36" wide and no higher than 36" AFF. The 2004 ADAAG adds a new requirement that this lowered section must extend the full depth of the counter. Rather than recognizing this as an incremental change which would then bring existing counters that are the appropriate height and width (but not depth) under the Element by Element Safe Harbor, the Department has called this a "clarification," thereby rendering all counters that are 36" wide and no more than 36" AFF non-compliant and subject to the readily achievable barrier removal requirement.

The 2004 ADAAG has also eliminated the equivalent facilitation option of providing a 36" high auxiliary counter in close proximity to the main counter which so many hotels have adopted, particularly those constructed prior to 1993.

22. Side reach: The maximum side reach will be lowered from 54" to 48" AFF. This will affect elements in spaces required to be accessible such as thermostats, light switches, hooks, towel dispensers, mounted hair dryers that are altered in the future.
23. Valet Parking Garages – Altered and New Hotels will have to provide one accessible parking space inside of a garage that is only used for valet parking on the theory that valet attendants will not always know how to operate cars outfitted for the disabled and those customers must be allowed to self-park. Although this item is listed in Appendix 8 of the RIA as an item that is subject to the Element by Element Safe Harbor, the RIA actually contains a \$1500 cost associated with "barrier removal," suggesting that Existing Facilities may have to comply immediately with this requirement. Clarification is necessary.

AH&LA seeks comment from members about the issues raised by allowing public access to valet only garages, including whether this change will result in increased insurance premiums.

24. Hotel Reservations -- The NPRM proposes new requirements for hotel reservations, as follows: (1) hotel must modify its policies, practices, and procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms in the same way as others (i.e., during the same hours and in the same manner as individuals who do not need accessible rooms); (2) hotel reservations services must identify and describe the accessible features in the hotels and guest rooms; (3) hotels shall guarantee accessible

guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible.

Questions posed by the Department on this subject are as follows:

Question 17: What are the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations? What are the practical effects of requiring a public accommodation to guarantee accessible guest rooms to the same extent that it guarantees other rooms?

Question 18: What are the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities? What factors are considered in making these determinations? Should public accommodations be required to hold one or more accessible rooms until all other rooms are rented, so that the accessible rooms would be the last rooms rented?

Question 19: Should a public accommodation that does not itself own, lease (or lease to), or operate a place of lodging but nevertheless provides reservations services, including reservations for places of lodging, be subject to the requirements of proposed § 36.302(e)(2) and (e)(3)?

AH&LA seeks member input on this issue.

25. Policies for other power driven mobility devices. New proposed section 36.311(a) states the general rule that public accommodations shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. However, new section 36.311(b) contains a new requirement that public accommodations must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities. If the hotel limits the use of power driven mobility devices it must develop a policy for when such devices can be used.

A “power-driven mobility device” is defined as “any of a large range of devices powered by batteries, fuel, or other engines. . . including golf cars, bicycles, electronic personal assistance mobility devices, or any mobility aid designed to operate in areas without defined pedestrian routes.”

The Department has posed the following questions on this issue:

Question 47: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

Question 48: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

Question 49: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

26. Issues for resorts/hotels that are made up of units owned by individual owners. Two unanswered questions under the current ADA regulations are (1) when is a time-share or condominium hotel covered by the ADA, and (2) what obligations does such a facility have to provide accessible rooms to the public? This is a very challenging issue because the units are individually owned and the owners do not have to put their units into the rental pool. Thus, an operator has no way to ensure that enough accessible units are in the rental pool, let alone ensure that all types of units are represented in the available accessible unit pool.

The Department has asked the following questions regarding this issue:

Question 51: The Department requests comments on determining the appropriate basis for scoping for a time-share or condominium-hotel. Is it the total number of units in the facility, or some smaller number, such as the number of units participating in the rental program, or the number of units expected to be available for rent on an average night the most appropriate measure?

Question 52: The Department's proposed definition of "place of lodging" includes facilities that are primarily short-term in nature, i.e., two weeks or less in duration. Is "two weeks or less" the appropriate dividing line between transient and residential use? Is thirty days a more appropriate dividing line?

Question 53: The Department believes that the scoping and technical requirements for transient lodging, rather than those for residential dwelling units, should apply to these places of lodging. Is this the most appropriate choice?

Question 54: How should the Department's regulation provide for a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program? Does the facility have an obligation to encourage or require owners of accessible units to participate in the rental program? Does the facility developer, the condominium association, or the hotel operator have an obligation to retain ownership or control over a certain number of accessible units to avoid this problem?

Question 55: How should the Department's regulation establish the scoping for a time-share or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging? How

should the condominium association, operator, or developer determine which units to make accessible?

27. Service animals – The NPRM states that (1) "service animal" does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents; and (2) animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not "service animals."

The Department has asked the following questions on this issue:

Question 10: Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the "common domestic animal" prong of the proposed definition?

28. No change to accessible room scoping. AH&LA had proposed that room scoping be reduced because the required numbers are not supported by empirical data, including the most recent census data and projected numbers for people with disabilities. The Department did not change the requirements in the Proposed ADA Standards.
29. Free-standing Equipment (i.e., self-check-in terminals). The Department says it will not address this in the regulation, but states the following about such equipment:

"Equipment has been covered under the Department's ADA regulation, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal, even though there is no provision specifically addressing equipment. See 28 CFR 36.302, 36.304. If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.

The Department has decided to continue with this approach, and not to add any specific regulatory guidance addressing equipment at this time. It intends to analyze the economic impact of future regulations governing specific types of free-standing equipment. The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities may apply those requirements to analogous free-standing equipment to ensure that they are accessible, and to avoid potential liability for discrimination. The Department also believes that when federal guidance for

accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D)."

30. Lack of guidance about the types of renovations that trigger the obligation to make a non-accessible rooms fully accessible in connection with a renovation. AH&LA had requested this guidance, but it is not provided in the NPRM. The 2004 ADAAG language about alterations is just as confusing as it was before. Section 202.3 states: "Where existing elements or spaces are altered, each altered element or space shall comply with the applicable requirements of Chapter 2."